IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN D. STEWART,

ORDER

Plaintiff,

10-cv-360-bbc

v.

Former Secretary MATTHEW FRANK,
RICH RAEMISCH, CYNTHIA THORPE,
JOHN and JANE DOES in Madison,
RICHARD SCHNEITER Wisconsin D.O.C.,
Warden PETER HUIBREGTSE, GARY BOUGHTON,
MONICA HORNER, CAPT. BROWN, CAPT. BOISEN,
CAPT. GERL, CAPT. GARDNER, CAPT. GILBERG,
CAPT. MASON, CAPT. SHARPE, LT. HANFELD,
LT. TOM, C.O. JUERGEN, C.O. JOSETH HASSELL,
C.O. TRACY MARTIN, SGT. P. HENNEMAN,
C.O. L. JOHNSON, C.O. CAYA, SGT. THOMAS SCHMIDT,
C.O. MCLIMANS, C.O. DANE ESSER, C.O. SCULLION,
SGT. SICKINGER, C.O. NELSON, C.O. HINRICHS,
SGT, BLOYER, SGT. CARPENTER, C.O. COCKROFT,
C.O. HULCE, T. BELZ the father, C.O. BELZ the son,
C.O. BEARCE, C.O A. JONES, C.O. C. FINNELL,
3RD Shift JONES, CHRISTINE BEERKIRSHER,
ELLEN K. RAY, KELLY TRUMM,
Social Worker A. JOHNSON, SGT. WALLACE,
SGT. WRIGHT, LT. GRONDIN, SGT. RICHTER,
C.O. FRIEDRICK, DR. BURTON COX,
Nurse CINDY SAWINSKI, Nurse MARY MILLER,
Nurse JOLINDA WATERMAN, Nurse MAURA,
Nurse VICKY, Nurse BONNIE STOBNER,
JANE and JOHN DOE Staff at Wisconsin Secure Program Facility,

Nurse DEB CAMBELL, Warden PHIL KINGSTON,
Unit Manager BRUCE SCHLESLAG, SGT. BILLY SCHLESLAG,
SGT. MAYS, ANGELINA KROLL, DR. CHARLIE LARSON,
Health Manager BELINDA SCHRUBBE, Nurse GAIL,
Warden GREG GRAMS, CAPT. RADTKE, C.O. BIDLEMAN,
C.O. NEUMAIER, C.O. SWANSON, C.O. KROCKER,
C.O. ISSACSON, SGT. KOTTKE, SGT. AL PULVER,
LT. SCHOENBERG, JANEL NICHOL, DR. D. SULIENE,
Nurse STEVE, Warden ROBERT HUMPHREYS,Deputy PAUL KEMPE,
JAY ALDANA, ADAM GEGARE, NANCY PADGETT, C.O. HERWIG,
C.O. STINE, SGT. BARRY, LT. K. SCHMIDT, DR. LUY,
JANE and JOHN DOE Staff at Racine, DR. BRUCE HARMS,
DR. BRADLEY WATERMAN, DR. CRYLEN,
DR. BENJAMIN R. BROOKS, DR. JOSETH P. HEISE,
District Attorney, LISA RINIKER, Grant Co. Sheriff KEITH GOVIER,
SGT. KOPP and Detective TRAVIS KLAAS,

Defendants.

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In an order entered August 26, 2010, I concluded that plaintiff's massive lawsuit would have to be broken up into 43 different cases, and ordered plaintiff to choose which of the 43 groups of claims he would like to pursue in this case and which he would like to pursue in separate cases. He has responded to that order, stating that he will pursue only one group of claims, which had been labeled group #3. This includes the claims that:

A. On March 8, 2006, defendants Thomas Schmidt, Joseth Hassell, Tracy Martin, Sgt. Henneman and C.O. Johnson attacked plaintiff while he was restrained, undoing his prolapse surgery, because he asked for medical help and because he is "black, prisoner and etc";

B. defendant Burton Cox refused to provide medical treatment for plaintiff's

broken elbow and delayed treatment for the undone prolapse;

C. defendant Friedrichs moved plaintiff after the incident;

D. defendant Monica Horner destroyed the video of the incident;

E. defendant Lisa Riniker improperly charged plaintiff with a crime for the incident because he is black and she is biased;

F. defendant Travis Klaas fed an eyewitness false information about the incident;

G. defendants Keith Govier and Sgt. Kopp knew plaintiff never committed any crime;

H. defendants Cindy Sawinski and Captain Gilberg drew blood after the incident to help frame plaintiff and Gilberg moved plaintiff to the Alpha unit;

I. defendant Hassell threatened to murder plaintiff after plaintiff was found not guilty of the crime; and

J. defendant Klaas investigated Hassell's threat despite a conflict of interest.

Now that plaintiff has chosen which group of claims he wishes to pursue in this case, his claims must be screened. Before plaintiff may proceed on his claims, the court must screen plaintiff's complaint and dismiss any claims that are legally frivolous, malicious, fail to state a claim upon which relief may be granted or ask for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e). Plaintiff's complaint will be construed liberally as it is reviewed for these potential defects because he is proceeding without a lawyer. Haines v. Kerner, 404 U.S. 519, 521 (1972).

As an initial matter, plaintiff has submitted two documents that appear to be attempts

to amend his complaint. Both his response to the Rule 20 order, dkt. #9, and a later document, dkt. #10, are titled "Civil Rights § 1983" and summarize some of the allegations related to the claims he is pursuing. However, each has a slightly different caption and neither includes the same level of detail about the incidents in question that his original complaint includes. In some respects, both documents appear to assume that the details in the original complaint will be incorporated into the new documents. Moreover, although plaintiff seeks to amend his complaint, he does not include new allegations about his claims. In sum, his new proposed amended complaints would not add anything to the complaint, and indeed would take something away. For that reason, I will deny plaintiff's implicit request to file an amended complaint. The original complaint remains the operative pleading.

As for the merits of plaintiff's claims, he may proceed on his excessive force claims, his medical care claim against defendant Cox and his claim related to the blood draw. The rest of his claims must be dismissed for failure to state a claim upon which relief may be granted.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

On March 8, 2006, while plaintiff was housed at the Wisconsin Secure Program

Facility, defendants Thomas Schmidt, Joseth Hassell, Tracy Martin, Sgt. Henneman and C.O. Johnson attacked plaintiff while he was handcuffed after he asked for medical help. Plaintiff was smashed into a steel cell door, choked and punched, among other things. As a result of the use of force, plaintiff's elbow was broken and his prolapse surgery from 13 days before came "undone," with all the stitches coming out. (Although plaintiff does not specify, from the allegations it appears he is referring to a rectal prolapse, a condition in which some or all of the rectum collapses and may protrude through the anus.) Defendants attacked plaintiff because he is "black, prisoner and etc." The whole attack was captured on video, but defendant Monica Horner, the security director, got rid of the video.

After the incident, defendants Cindy Sawinski and Captain Gilberg drew blood to help frame plaintiff. In addition, Gilberg moved plaintiff to the Alpha unit. Plaintiff tried to get treatment for his broken elbow and prolapse, but defendant Burton Cox denied his request for care. On March 21, 2006, plaintiff was finally taken to the UW Health clinic to have his prolapse examined. A doctor who examined him "accused the transporting officers," defendant Friedrick and an unknown officer. Another doctor called Cox and asked him why it took 13 days for the prison to get plaintiff to the hospital, when Cox knew plaintiff's surgery had come undone.

Defendant Lisa Riniker is a district attorney who charged plaintiff with a crime for the incident. She has a friend who works at the Wisconsin Secure Program Facility. She

charged plaintiff with a crime "because [he is] black and [she] could." Defendant Travis Klaas was a detective on the criminal case; he told an eyewitness what happened instead of letting the eyewitness tell him. On March 7, 2008, plaintiff went to a trial on the criminal matter and was found not guilty of battery. After the trial, defendant Hassell threatened to kill plaintiff and his defense attorney. Klaas investigated Hassell's threat despite a conflict of interest. Defendants Keith Govier and Sgt. Kopp knew plaintiff never committed any crime because Hassell himself stated that plaintiff did not bite him.

OPINION

A. Excessive Force, Retaliation and Equal Protection

First, plaintiff contends that defendants Thomas Schmidt, Joseth Hassell, Tracy Martin, Sgt. Henneman and C.O. Johnson violated his rights by attacking him while he was restrained because he complained about his need for medical care and is "black, prisoner and etc." This assertion includes three different constitutional violations: excessive force, violation of the equal protection clause and retaliation. The allegations support only the first of the three violations

1. Excessive force

Excessive force claims are governed by the Eighth Amendment. They require a court

to determine "whether [the] force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this determination include:

- the need for the application of force;
- the relationship between the need and the amount of force that was used;
- the extent of injury inflicted;
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and
- any efforts made to temper the severity of a forceful response.

Id. at 321. In Hudson v. McMillan, 503 U.S. 1, 9-10 (1992), the Court refined this standard, explaining that the extent of injury inflicted was one factor to be considered, but the absence of a significant injury did not bar a claim for excessive force so long as the officers used more than a minimal amount of force.

In this case, plaintiff alleges that defendants Schmidt, Hassell, Martin, Henneman and Johnson participated in an attack on him while he was restrained that caused him serious injuries. Under these facts, an inference can be drawn that these defendants used force "maliciously and sadistically" and not for the sake of "maintaining or restoring discipline." Therefore, plaintiff may proceed on his excessive force claim.

2. Equal protection and retaliation

Plaintiff's contention that defendants mistreated him because he complained about medical care and because he is "black, prisoner, etc." suggest that he wishes to assert claims for violation of the equal protection clause and retaliation. Under the equal protection clause of the Fourteenth Amendment, government officials must have at least a rational basis for different treatment, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985), and in the case of different treatment because of race, even more is required. Johnson v. California, 543 U.S. 499 (2005) (heightened scrutiny applies). In addition, government officials cannot "retaliate" against a prisoner for the prisoner's engaging in protected activity. Bridges v. Gilbert, 557 F.3d 541, 555-56 (7th Cir. 2009); Hoskins v. Lenear, 395 F.3d 372, 375 (7th Cir. 2005).

Plaintiff does not include any allegations that support his conclusory statement that defendants attacked him because he complained about medical care or because he was black or a prisoner. Under Fed. R. Civ. P. 8, a plaintiff must do more than include broad statements about the elements of his claim. As the Supreme Court explained in Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, when deciding whether a claim satisfies Rule 8, a court should disregard pleadings that are "no more than conclusions" and accept as true only "well-pleaded factual allegations." Only if those allegations make a claim for relief "plausible" on

its face does the complaint satisfy Rule 8. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007); Iqbal, 129 S. Ct. at 1953 (2009) (rule from Twombly applies to "all civil actions"). This means the complaint must include enough detail about what each defendant did to show a real possibility (and not just a guess) that plaintiff might be able to prove each element of his claims after he has an opportunity to fully investigate them. Twombly, 550 U.S. at 555; Riley v. Vilsack, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009).

Because plaintiff fails to include allegations to support his suspicions that defendants had improper motives for using the force they did, he cannot proceed on his retaliation and equal protection claims. Those claims must be dismissed for failure to state a claim upon which relief may be granted.

B. Medical Care

Plaintiff contends that defendant Burton Cox refused to provide medical treatment for plaintiff's broken elbow and delayed treatment for the undone prolapse. He also points out that medical professionals believed that defendant Friedrick may have exacerbated his undone prolapse when he transported plaintiff to the hospital after the incident.

In addition to prohibiting the use of excessive force against a prisoner, the Eighth Amendment also prohibits disregarding a prisoner's serious medical need. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). "Serious" medical needs include those that are life-threatening,

carry risks of permanent serious impairment if left untreated, result in needless pain and suffering when treatment is withheld, Gutierrez v. Peters, 111 F.3d 1364, 1371-73 (7th Cir. 1997), "significantly affect[] an individual's daily activities," Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998), cause pain, Cooper v. Casey, 97 F.3d 914, 916-17 (7th Cir. 1996), or otherwise subject the prisoner to a substantial risk of serious harm, Farmer v. Brennan, 511 U.S. 825 (1994). A prison official cannot act with "deliberate indifference" to a serious medical need, meaning that if the official is aware that the prisoner needed medical treatment, he or she must take reasonable measures to address it. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997). What measures are reasonable depends on the context; for instance, if a plaintiff needs medicine, a doctor may need to write the prescription, while a nurse would only have to report to the doctor or administer medicine and a guard might have to do even less, either telling medical staff or making sure the plaintiff is able to tell medical staff himself without unreasonable delay.

In this case, plaintiff alleges that Cox provided no treatment at all for his broken elbow and undone prolapse. At this early stage, an inference can be drawn that both the injuries to plaintiff's elbow and his undone prolapse posed sufficiently serious problems to his health that he should have received treatment. Because Cox allegedly knew about these problems, his alleged failure to provide any treatment would constitute "deliberate indifference" to a serious medical need. Therefore, plaintiff may proceed on this claim.

As for plaintiff's claim against Friedrick, the only allegation suggesting Friedrick had anything to do with plaintiff's medical care is an allegation that a doctor thought the transporting officers (including Friedrick) had caused problems with his prolapse. Plaintiff does not suggest that either transporting officer was aware that he may have been exacerbating plaintiff's condition or that he should take extra care when transporting plaintiff. Because the allegations fail to suggest that Friedrick acted with deliberate indifference to plaintiff's medical needs or acted "maliciously and sadistically" while transporting him, the claim against Friedrick must be dismissed.

C. Destruction of Evidence

Plaintiff's claim against defendant Horner is that she violated his rights by destroying a videotape of the alleged excessive force incident. Plaintiff may be trying to assert one of two claims, both of which fail. First, plaintiff may be arguing that the destruction of evidence has denied him meaningful access to the courts. However, if an individual has first-hand knowledge of the facts and circumstances surrounding the incident, the individual has not been denied meaningful access to the courts, even when a defendant conceals evidence. Thompson v. Boggs, 33 F.3d 847, 852-53 (7th Cir. 1994). Plaintiff can bring this lawsuit without corroborating videotape evidence because he has first-hand knowledge of the actions the prison officers took against him.

Plaintiff may also be arguing that there has been spoliation of evidence. Spoliation of evidence is an evidentiary matter, which would arise later in the lawsuit. Very few jurisdictions recognize destruction or "spoliation" of evidence as an independent tort, and Wisconsin is not one of them. E.g., J.S. Sweet Co., Inc. v. Sika Chemical Corp., 400 F.3d 1028, 1032 (7th Cir. 2005); Neumann v. Neumann, 2001 WI App 61 ¶ 80, 242 Wis. 2d 205, 626 N.W. 2d 821.

D. Malicious Prosecution and Equal Protection and Tampering with Witnesses

The next group of defendants relates to criminal charges that arose from the excessive force incident. Plaintiff alleges that defendant Riniker charged him with a crime for the incident because he is black and she is biased, that defendant Klaas fed an eyewitness false information about the incident and that Govier and Kopp knew plaintiff never committed any crime but failed to act. None of these claims can proceed.

Plaintiff's claims against Riniker, Klaas, Govier and Kopp have many problems. First, Riniker is a prosecutor, which means she is protected from suit by the doctrine of prosecutorial immunity. Kalina v. Fletcher, 522 U.S. 118 (1997) ("A state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is not amenable to suit under 1983."); see also Buckley v. Fitzsimmons, 509 U.S. 259 (1993) ("[A]cts undertaken by a prosecutor in preparing for the initiation of

judicial proceedings or for trial, and which occur in his role as an advocate for the State, are entitled to the protections of absolute immunity.").

As for plaintiff's claims against Govier and Kopp, it is not clear what their role was supposed to be. Plaintiff alleges only that they knew he had done nothing wrong. It is not clear that either of them could have done anything to prevent the allegedly improper prosecution, let alone that either had a duty to do so. Cf. Burks v. Raemisch, 555 F.3d 592, 595-96 (7th Cir. 2009) (rejecting plaintiff's theory that "any public employee who knows (or should know) about a wrong must do something to fix it").

Plaintiff's claim against Klaas is simply that Klass attempted to manufacture evidence against him. As with Horner's destruction of videotape, an investigator's manipulation of evidence alone is not a tort. At most, plaintiff's allegations suggest a form of malicious prosecution against him. Such a claim is not recognized in this circuit as a constitutional tort, Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001). If plaintiff wished to bring a state law claim for malicious prosecution, he had to file a notice of claim as required by state law. He has not said that he did so.

E. Blood Draw

Next, plaintiff contends that defendants Sawinski and Gilberg drew blood after the excessive force incident without his consent. The Supreme Court has recognized a right to

receive due process of the law in prison before receiving certain types of mandatory treatment. Washington v. Harper, 494 U.S. 210 (1990) (due process clause protects inmates from involuntary administration of psychotropic drugs); Vitek v. Jones, 445 U.S. 480 (1980) (liberty interest arises when inmate is transferred to mental hospital and subjected to mandatory treatment). At the same time, more recently the Court explained that a prisoner's due process rights are limited to those instances in which the actions impose an "atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995).

At this stage, it is unclear whether the forced blood draw could be considered an "atypical and significant hardship," but drawing all inferences in plaintiff's favor, I conclude that he may proceed on this claim. It appears that he did not receive any process before the blood was drawn even though such a blood draw may have been sufficiently "atypical and significant" to warrant process. Therefore, plaintiff may proceed on a claim that Sawinski and Gilberg drew blood without first providing him due process.

Plaintiff adds that Gilberg moved him to the Alpha unit, but does not explain what was wrong with that decision and how it cause him any injury. Therefore, this claim must be dismissed for failure to state a claim upon which relief may be granted.

G. Threat to Murder and Investigation

Plaintiff contends that defendant Hassell violated his rights by threatening to murder plaintiff after plaintiff prevailed in the criminal case against him. Under the circumstances, it is reasonable to infer that the threat was made "maliciously and sadistically" and not for the purpose of restoring order. Thus, plaintiff may proceed on an Eighth Amendment excessive force claim against Hassell for the alleged death threat.

Plaintiff adds a claim against defendant Klaas for investigating the death threat despite a "conflict of interest." Plaintiff's role as the alleged victim does not entitle him to a certain standard of criminal investigation. A victim has no cause of action available to him arising out of an officer's alleged violation of "conflict of interest" laws during a criminal investigation.

ORDER

IT IS ORDERED that

1. Plaintiff Steven D. Stewart may prosecute in the context of this case the claims identified in an order entered August 26, 2010, dkt. #8, as #3 of the listed groups of claims.

2. Plaintiff's claims identified in the previous order identified as groups ##1-2 and 3-43 are DISMISSED without prejudice.

3. Plaintiff's request for leave to proceed is GRANTED on his claims that

a. defendants Thomas Schmidt, Joseth Hassell, Tracy Martin, Sgt. Henneman and C.O. Johnson used excessive force against him by attacking him while he was restrained;

b. defendant Burton Cox acted with deliberate indifference to plaintiff's serious medical needs by failing to provide treatment for plaintiff's broken elbow and undone prolapse;

c. defendants Cindy Sawinski and Captain Gilberg drew blood after the incident; and

d. defendant Hassell threatened to murder plaintiff after plaintiff was found not guilty of a crime.

4. Plaintiff's request for leave to proceed is DENIED with respect to the following claims, which are DISMISSED with prejudice for failure to state a claim upon which relief may be granted:

a. defendants Schmidt, Hassell, Martin, Henneman and Johnson retaliated against him and violated his equal protection rights when they attacked him;

b. defendant Friedrick acted with deliberate indifference to a serious medical need or used excessive force against plaintiff while transporting him;

c. defendant Monica Horner violated plaintiff's rights by destroying a video of the alleged excessive force incident;

d. defendant Lisa Riniker charged plaintiff with a crime because he is black and she is biased;

e. defendant Travis Klaas tampered with witnesses;

f. defendants Keith Govier and Sgt. Kopp knew plaintiff was innocent and did nothing;

g. defendant Gilberg moved plaintiff to the Alpha unit; and

h. defendant Klaas investigated Hassell's threat despite a conflict of interest.

5. Plaintiff's complaint is DISMISSED with respect to defendants Matthew Frank, Rich Raemisch, Cynthia Thorpe, John and Jane Does in Madison, Richard Schneiter, Peter Huibregste, Gary Boughton, Monica Horner, Capt. Brown, Capt. Boisen, Capt. Gerl, Capt. Gardner, Capt. Mason, Capt. Sharpe, Lt. Hanfeld, Lt. Tom, C.O. Juergen, C.O. Caya, C.O. McLimans, C.O. Dane Esser, C.O. Scullion, Sgt. Sickinger, C.O. Nelson, C.O. Hinrichs, Sgt. Bloyer, Sgt. Carpenter, C.O. Cockroft, C.O. Hulce, T. Belz, C.O. Belz, C.O. Bearce, C.O. A. Jones, C.O. C. Finnell, 3rd Shift Jones, Christine Beerkirsher, Ellen K. Ray, Kelly Trumm, A. Johnson, Sgt. Wallace, Sgt. Wright, Lt. Grondin, Sgt. Richter, C.O. Friedrick, Mary Miller, Jolinda Waterman, Nurse Maura, Nurse, Vicky, Bonnie Stobner, Jane and John Doe Staff at Wisconsin Secure Program Facility, Deb Cambell, Phil Kingston, Bruse Schleslag, Billy Schleslag, Sgt. Mays, Angelina Kroll, Charlie Larson, Belinda Schrubbe, Nurse Gail, Greg Grams, Capt. Radtke, C.O. Bidleman, C.O. Neumaier, C.O. Swanson, C.O. Krocker,

C.O. Issacson, Sgt. Kottke, Sgt. Al Pulver, Lt. Schoenberg, Janel Nichol, D. Suliene, Nurse Steve, Robert Humphreys, Paul Kempe, Jay Aldana, Adam Gregare, Nancy Padgett, C.O. Herwig, C.O. Stine, Sgt. Barry, K. Schmidt, Dr. Luy, Jane and John Doe Staff at Racine, Bruce Harms, Bradley Waterman, Dr. Crylen, Benjamin R. Brooks, Joseth P. Heise, Lisa Riniker, Kieth Govier, Sgt. Kopp and Travis Klaas.

6. For the remainder of this lawsuit, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

7. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

8. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint for the defendants on whose behalf it accepts service.

9. Because I have dismissed a portion of plaintiff's complaint for one of the reasons listed in 28 U.S.C. § 1915(g), a strike will be recorded against plaintiff.

10. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at the Wisconsin Secure Program Facility of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 14th day of September, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge